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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 512

JAMES BASHAM,

Petitioner,

vs.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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Opinions Below

The opinion of the trial court, the New York State Supreme Court, Kings County, is not officially reported. It is printed in full (R. 123-126).* The affirmance of the trial court, without opinion, by the Appellate Division of the New York State Supreme Court with dissenting opinion (R. 133) is reported in 10 App. Div. 2d 948, 201 N.Y.S. 2d (1960). The affirmance without opinion of the Court of Appeals of the State of New York (15a-16a) is officially reported in 11 N.Y. 2d 991 (1962).

* References with the prefix "R" are to pages of the transcript of record in this court. References with the suffix "a" are to the appendix accompanying this brief.

Jurisdiction

Judgment of the Court of Appeals of the State of New York was entered on June 13, 1962 (R. 137-138). The petition was filed August 3, 1962 and was granted October 15, 1962. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257. (3).

Question Presented

Whether in view of the repeatedly articulated policy of this Court that in actions under the Federal Employers' Liability Act, the employee shall have the right to a jury determination with respect to the issues of fact, the Court of Appeals of the State of New York was justified in affirming the action of the trial court in setting aside a jury verdict in favor of the employee in a Federal Employers' Liability Act action where the employee proved a prima facie case and the railroad raised at most only a question of fact resolved by the jury in the employee's favor?

Statute Involved

The statutory provision involved is the Federal Employers' Liability Act, 53 Stat. 1404 (1939), 45 U.S.C. Sec. 51 et seq. (1958) (hereinafter the FELA) (13a-14a).

Statement

This case was commenced under the FELA on April 18, 1956 in the Supreme Court of the State of New York, Kings County, to recover damages for personal injuries sustained as a result of respondent's negligence (R. 3-5). Respondent's liability arising under the FELA was raised in the complaint (R. 3) and at each stage of the appeal.

After trial, the jury returned a verdict in favor of petitioner for $15,000.00 (R. 100). This verdict was set aside by the trial court on the ground that petitioner failed to prove negligence on respondent's part. The trial court directed a verdict for respondent (R. 123-126).

Judgment was affirmed without opinion by the Appellate Division, Second Department, Kleinfeld, J. dissenting in a memorandum opinion stating that there was sufficient proof to sustain the jury verdict (R. 133). On May 17, 1962 the Court of Appeals of the State of New York affirmed without opinion the decision of the Appellate Division (15a-16a).

The accident involved occurred on January 7, 1956 when petitioner, an employee of respondent, was working as a car repairman, installing new wheels on a railroad car. He was in a pit beneath the car standing on a movable hoist platform mounted on tracks at the bottom of the pit (R. 12-14, 25). As the new wheels were being raised, petitioner was holding a heavy wheel spring in position between the raising wheel assembly and the railroad car (R. 25). The hoist platform upon which petitioner was standing suddenly moved causing him to lose his balance. The heavy spring fell on petitioner, causing amputation and other serious complications (R. 25-29).

No clamp, press, or other locking device was provided to hold the movable hoist platform in position during the wheel installation (R. 25, 69). Before this accident there was a history of hoist platform movement during this very operation and a locking device was provided on the movable hoist platform in an adjacent pit, but not in the pit in which petitioner was required to work (R. 46-47).

Petitioner testified that the platform did move (R. 25). Charles Harper, a mechanic-employee of respondent, testi-

fied that in his opinion the platform could move as there was motion at two points during the lifting operation, at the juncture of the wheel assembly and railroad car (R. 48) as well as in the hoisting assembly itself (R. 45) Mr. Harper testified that not only could the platform move, but in fact, he saw it move at the time of petitioner's accident (R. 47).

Respondent's opinion witness, an assistant foreman employee, testified that there was play (movement) at various points during the hoisting operation and conceded that there was at least ¼ inch of play at the juncture of the wheel assembly and railroad car even when the car is in operation. This witness' opinion, however, differed from the opinion testimony of the eye witness Harper. In the assistant foreman's opinion (in spite of the admitted ¼ inch play) the platform could not have moved (R. 73-76).

Respondent did not contest the happening of the accident nor present any alternative theory as to how it happened. It merely argued that, based upon the opinion testimony of its witness, the accident could not have been caused by the movement of the hoist platform.

The jury found that the platform could and did move. This finding was endorsed by Judge Kleinfeld, who dissented in the Appellate Division, stating "In my opinion, there is sufficient proof in the record that the platform actually moved" (R. 133). Judge Kleinfeld voted to affirm the jury verdict stating,

> "So long as the record contains any reasonable basis to support the plaintiff's version of the accident, the direction of the verdict in defendant's favor is improper although 'there is evidence tending to show it was physically and mathematically impossible' (*Lavender v. Kurn*, 327 U.S. 645, 652 . . .)."

Summary of Argument

This Court has repeatedly held that a railroad employee shall have the right to a jury determination of the issues of fact in an action under the FELA. In this action the jury resolved the only issues raised, issues of fact, in favor of petitioner (an employee of respondent). The affirmance by the New York Court of Appeals of the action of the trial judge in setting aside this jury determination, constituted a wrongful denial of petitioner's right to a jury trial.

ARGUMENT

The New York Court of Appeals Was in Error in Affirming the Action of the Trial Court in Setting Aside a Jury Verdict in Petitioner's Favor in an FELA Action Where (a) Petitioner Proved a Prima Facie Case, and (b) Respondent Raised at Most Only a Question of Fact Which Was Properly Resolved by the Jury in Petitioner's Favor.

In an action under the FELA the fact issue of the railroad's negligence is solely within the province of the jury. This special statute passed for the benefit of railroad workers whose hazardous employment leads to frequent and severe injuries has been clearly defined by this court. The scope and the right to a jury determination of the issue of negligence has been made abundantly clear—this court has not and should not permit the deprivation of the employee's right to such determination by any court, either state or federal.

Moore v. *Terminal R.R. Assn. of St. Louis*, 358 U.S. 31;

Rogers v. *Missouri Pacific R.R. Co.*, 352 U.S. 500;

Schulz v. *Penn. R.R. Co.*, 350 U.S. 523;
Wilkerson v. *McCarthy*, 336 U.S. 53;
Lavender v. *Kurn*, supra.

The cases and quotations are legion and to the same effect. Where there is any evidentiary basis in the record to support the jury's verdict the trial court and appellate courts should not set it aside.

(a) Petitioner Proved a Prima Facie Case.

In this action petitioner proved a prima facie case. This was even recognized by trial court, in denying respondent's motions at the end of petitioner's case (R. 54-56).

Charles J. Harper, one of the mechanics in charge of the pit when the accident happened testified that he had 7 or 8 years experience in the pits (R. 44). He testified that petitioner was standing on the movable hoist platform holding the spring with both hands (R. 45). Harper started the hoist motor and as the new wheel assembly was being raised, Harper saw the platform move, heard petitioner "holler" and saw the results of the injury (R. 47).

Harper confirmed petitioner's testimony stating his opinion that in his 7 or 8 years experience in the pits there was play between the vertical hoist cylinder and the cross bar* (R. 44-45) as well as play between the journal box and pedestal lining (R. 49).** It was Harper's opinion that

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* The hoist which is mounted on the movable platform consists of a vertical shaft or cylinder. The cylinder forms a "T" with a horizontal cross bar attached to the cylinder top by means of a nut. There are upright "V" shaped prongs at each end of the crossbar (R. 15, 71-72).

** The journal box is part of the wheel assembly and is attached one to each end of the axle, on the outside of each wheel (R. 73-74). The pedestal is an inverted "U" shaped receptacle for the journal box one attached to each side of the car. When the journal boxes are fully inserted into the pedestals the entire wheel assembly is secured to the car by the use of "thrust lugs" (R. 73).

the insertion of the journal box into the pedestal did not lock the hoist platform in position and that in his experience there had been platform movement after insertion (R. 48). Harper testified that before the accident the movement of these platforms while men were raising wheels in the pit had prompted complaints to supervisors at safety meetings. Harper further testified that he had notified his supervisor concerning the danger of moving platforms and a hook and eye device was installed in a No. 2 pit, but none was installed in the adjacent No. 3 pit where this accident subsequently occurred (R. 46).

From this evidence the jury could and in fact did conclude that the hoist platform moved, throwing petitioner off balance causing the injuries suffered. There was evidence in the record sufficient to justify the jury's conclusion that despite warnings of danger, respondent did not take suggested precautions to avoid this danger in the pit in which the accident occurred although such precautions had been taken in an adjacent pit. To be careful, an employer must care. Respondent did not care enough to provide safe equipment or place a hook and eye lock or other safety device in the pit where the accident occurred. Petitioner presented a prima facie case and the language of this Court in *Lavender* v. *Kurn*, *supra*, p. 653 is apposite here. A jury verdict can be set aside:

> "Only when there is a complete absence of probative facts to support the conclusion reached..... But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when the evidentiary basis becomes apparent it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

(b) Respondent Raised at Most Only a Question of Fact Which Was Properly Resolved by the Jury in Petitioner's Favor.

The defense was based upon the opinion testimony of a railroad assistant foreman that the platform upon which petitioner was standing at the time of the accident could not have shifted. Although this theory was rejected by the jury, it was the basis of the trial court's decision to set aside the jury verdict and the affirmance of that decision throughout the appellate courts of New York.

The court's rejection of the jury verdict was necessarily based upon its acceptance of the opinion of respondent's assistant foreman and the rejection of the contrary opinion and eye witness testimony of respondent's mechanic, Harper.*

At one point in his testimony respondent's assistant foreman (who did not witness the accident) gave his opinion that the hoist platform could not move after the journal box had been inserted in the pedestal (R. 73-74).

He did, however, concede that there was "a quarter of an inch of lateral play" or movement between the pedestal and the journal box even after insertion. This was so even when the car was in operation, i.e., when the wheels were fully raised and the journal boxes were secured in the pedestals by "thrust lugs" (R. 73-74). He also conceded

* The opinions of the assistant foreman and the mechanic were accepted upon their experience alone, neither having any specialized engineering education or training (R. 75). In *Fritts* v. *Toledo Terminal Railroad Company*, 293 F. 2d 361 (6th Cir. 1961), it was held that "qualified persons and experienced railroad employees may testify and express opinions on matters of this type." (A locomotive engineer should be permitted to testify as to the effect of a worn switch "frog" would have on train movement.)

that there was tipping or play of the hoist cross bar when the wheel assembly was being raised (R. 76). He admitted that a hook and eye device had been placed in the adjacent pit to immobilize it (R. 77-78). The opinion of respondent's assistant foreman that the platform could not move was contrary to his own admission that there was a 1/4 inch play and in conflict with the opinion of respondent's mechanic and the eye witness accounts of petitioner and Harper that the platform could and did move.*

The conclusion of respondent's assistant foreman that the platform could not move is not one that the jury, as a matter of law, was bound to accept. We ask that the following facts, not in dispute be considered:

1. There was a fixed object, an 80 ton railroad car, from which were extended fixed receptacles (pedestals) which were to receive a new wheel assembly. (This is conceded by both sides.)

2. The accident occurred while a movable jack or hoist assembly was lifting a movable wheel assembly to the fixed railroad car. The movables had not yet been joined to the fixed. (This is conceded by both sides.)

3. At the time of the accident the movables were in partial juncture with the fixed, i.e., the journal box on the side of the car on which petitioner was working was partially inserted in the pedestal. (This is conceded by both sides.)

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* Respondent's only other witness, A. S. Genova, was respondent's foreman. Genova, also not a witness to the accident, denied actual notice of the need for a locking device thus raising another issue of fact (R. 69). Genova was respondent's employee for approximately 28 years and had more experience than either the assistant foreman or the mechanic. Yet he was not asked to give his opinion with regard to the movement of hoist platforms.

Petitioner testified that the movement between the journal box and the pedestal, after partial insertion, was one to two inches (R. 39). Motion was further confirmed by the testimony of respondent's mechanic (R. 47). According to respondent's assistant foreman, however, the remaining movement was only $\frac{1}{4}$ inch (R. 73-76).

It is submitted, therefore, that at the very least, the jury was free to conclude that the platform could have moved from $\frac{1}{4}$ to 2 inches.

Further, the opinion of respondent's assistant foreman failed to take into account several other factors. There was no evidence that the car, the pedestal lining or journal boxes, the movable platform, the hoist or any of their related parts were inspected either before or after the accident. Yet the assistant foreman in order to arrive at his opinion that the play between the journal boxes and the pedestals did not exceed $\frac{1}{4}$ inch assumed that all of the parts of the assembly were in proper condition. There was no evidence that $\frac{1}{4}$ inch was the limitation of this particular car.

The assumed facts, essential to the opinion upon which respondent relies, should have been determined by inspection. But respondent's assistant foreman completely disregarded the possibility that a defect in the pedestal lining or the journal box, or the attachment of the forks to the cross bar, or of the cross bar to the hoist, or of the hoist to the platform could have thrown the platform out of line.*

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* See dissenting opinion in Appellate Division, Second Department in which Kleinfeld, J. states: "The conceded fact that the platform which was on wheels, was supporting the weight of eighty tons, does not render movement impossible, in the absence of proof that the eighty ton pressure was applied perpendicularly to the platform's center of gravity" (R. 133). The eighty ton car was independently supported by the rails at the top of the pit (R. 14-15).

It is submitted that the negative opinion which formed the basis of respondent's defense was founded upon speculation. The affirmative opinion of respondent's mechanic that the platform could shift was based upon actual affirmative experience. Moreover, petitioner and the mechanic both saw the platform move at the time of the accident.

The jury was free to believe the assistant foreman. They were equally free to believe the eye witness testimony of the petitioner and the mechanic, Harper, who also gave opinion testimony which conflicted with the opinion expressed by the assistant foreman. The jury accepted the testimony of the petitioner and the respondent's mechanic. The trial judge was free to believe otherwise but was not correct in setting his belief over the beliefs of the jury.

Respondent, both on the trial and on the arguments to the state appellate courts below, relied, also, on photographs which it offered at the trial, particularly Defendant's Exhibits B and C (R. 117-118). These photographs were, however, taken by respondent either laterally or obliquely laterally and reveal only a side view of the journal box and pedestal. It is not possible from these photographs to determine what, if any, space is present between the journal box and the pedestal lining on the outside of the car. The inner side of the pedestal lining is completely obscured in the photograph. If respondents had wanted to demonstrate the spacial relationships at this juncture of equipment, the photographs should have been taken from the base of the pit upwards or from a point on the wheel assembly over the journal box or even from one end of the car. The weight to be given these photographs was also for the jury's determination.

Congress has dictated and this court has often reiterated that it is within the province of the jury to determine the

credibility of witnesses and the weight to be given to testimony and evidence.

Despite frequent repetition of the controlling law, the courts below did not follow the federal rule with respect to the role of a jury in this FELA case. The opinion of the trial judge in setting aside petitioner's jury verdict and dismissing the complaint cites not one FELA case but rather, only cases dealing with the sufficiency or proof under the common law of the State of New York. Only Judge Kleinfeld who dissented in the Appellate Division and voted to reinstate petitioner's verdict noted the special rule covering the role of the jury in FELA cases.

It is submitted that the record below clearly establishes that an issue of fact was raised at the trial. With respect to this issue, petitioner had the right to a jury determination. The affirmance by the New York Court of Appeals of the action of the trial court in setting aside the jury verdict, in effect, denied this right to petitioner.

Conclusion

For the foregoing reasons this Court should reverse the decision of the Court of Appeals of the State of New York and remand this case to that court with instructions to reinstate the jury's verdict.

Respectfully submitted,

IRA GAMMERMAN
Counsel for Appellant

APPENDIX

45 U.S.C. SECTION 51

Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

45 U.S.C. Section 53

Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee;

Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 3, 35 Stat. 66.

45 U.S.C. Section 54

Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404.

Decision by the Court of Appeals of the State of New York

Appeal from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 27, 1960, affirming, by a divided court, a judgment of the Supreme Court in favor of defendant, entered in Kings County upon a dismissal of the complaint by the court at a Trial Term (A. David Benjamin, J.) after the court set aside a verdict in favor of plaintiff. The action was commenced by plaintiff, a car repairman's helper employed by defendant railroad, under the Federal Employers' Liability Act (U.S. Code, tit. 45, Sec. 51 et seq.) to recover damages for personal injuries claimed to have been sustained as a result of the negligence of defendant. On January 7, 1956, in the Sunnyside Yard, a railroad yard operated by defendant and located in the Borough of Queens, City of New York, plaintiff was helping three other employees to place a new set of wheels on a railroad coach owned by defendant. He was standing on a platform in a repair pit under the coach and was holding a coil spring weighing approximately 110 pounds when the platform on which he was standing allegedly moved, throwing him off balance and causing the spring to hit his finger. Charles Harper, the car repairman whom plaintiff was helping at the time of the accident, testified that he saw the platform move, but that he did not see the accident. Defendant introduced into evidence a statement signed by Harper on the day of the accident in which he stated that, at the time thereof, he was in the pit operating the wheel hoist; that he and plaintiff had put the spring on its seat; that plaintiff was to hold the spring while he worked the hoist; that, when everyone was ready, he started to raise the hoist, and that he then heard the spring fall and saw plaintiff spin around and grab his hand. In answer to a question as to what caused the spring to fall out of place, Harper

stated that "while I was going up with the hoist the wheel pushed the shoe head back and in doing so moved the spring seat so that the spring slipped off the equalizer and jumped out of place." There was testimony that the platform could not shift since it was held in place by the 80-ton weight of the coach. The trial court stated that plaintiff offered no proof to show that other than the ordinary and usual manner of operation in repair of coaches was employed at the pit in which he was injured; that he did not rebut the testimony that the platform was immovable, and that he failed to establish the manner in which the accident happened. In the Court of Appeals plaintiff argued that, since this was an action under the Federal Employers' Liability Act, the jury verdict should stand since he proved a prima facie case and since the defense of immovability of the platform raised, at most, a question of fact for the jury.

Ira Gammerman, for appellant.

David J. Mountan, Jr., for respondent.

Judgment affirmed, without costs; no opinion.

Concur: Chief Judge Desmond and Judges Dye, Fuld, Froessel, Van Voorhis, Burke and Foster.